IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.2323 OF 2006

Ramesh Kumar Kedia ..... Petitioner.

V/s

State of Maharashtra & Ors. ..... Respondents.

Mr. B.B. Parikh for the Petitioner.

Mr. Y.M. Nakhwa, APP for the State.

Mr. Sandesh D. Patil for Respondent No.2.

CORAM: V.M. KANADE, J.
DATE : 29th August, 2007

P.C.:

1. Rule.

2. Rule is made returnable forthwith.

3. Respondents waive service.

4. Heard Mr. Parikh, the learned Counsel appearing on behalf of the Petitioner and Mr. Patil, the learned Counsel appearing on behalf of Respondent No.2.

5. Petitioner has filed this Petition under Article 227 of the Constitution of India being aggrieved by the order of issuance of process which was passed by the J.M.F.C., Dahanu in a complaint which was filed by Respondent No.2 under section 138 of the

Negotiable Instruments Act.

6. Briefs facts are that it is the case of Respondent No.2 that in view of the settlement of dispute between the parties, a cheque was issued by the Petitioner herein which was deposited by Respondent No.2 in his Bank at Dahanu and the said cheque was dishonoured with remark that the said account had been closed. Notice was issued by Respondent No.2. However, in spite of the said notice being served, Petitioner did not make payment and, therefore, a complaint was filed by Respondent No.2 under section 138 of the Negotiable Instruments Act, and 420 & 406 of Indian Penal Code. The learned Magistrate was pleased to issue process under section 138 of the Negotiable Instruments Act. The said order was challenged by the Petitioner herein by filing revision application. However, revision application was also dismissed by the Sessions Court by passing a reasoned order dated 18/8/2006.

7. The learned Counsel appearing on behalf of the Petitioner submitted that the Magistrate had erred in issuing process mechanically and there was a complete non-application of mind on the part of the Magistrate while the process was issued. He invited my attention to a xerox copy of the cheque which is annexed to the compilation filed by the Petitioner. He submitted that the said cheque was forged and fabricated by Respondent No.2. He also invited my attention to the Bank Memo which is annexed to the compilation wherein it is stated that the said account is closed and the name of M/s Radhey Krishna is mentioned therein. He submitted that it was

obvious that the said cheque belonged to M /s Radhey Krishna and, therefore, it was obvious that the Petitioner had not issued the said cheque. He submitted that, therefore, on this ground alone, the complaint was liable to be dismissed. He then submitted that the notice which was issued was, in fact, not served on the Petitioner. He submitted that, further, the name of the Petitioner was wrongfully mentioned as Rajesh though is name is Ramesh. He submitted that, therefore, in the absence of service of notice, the complaint was not maintainable under the provisions of section 138 of the Negotiable Instruments Act. In support of the said submission, he invited my attention to the judgment of the Apex Court in Punjab National Bank and others Vs. Surendra Prasad Sinha, reported in **AIR 1992 SC 1815.**

8. Mr. Patil, the learned Counsel appearing on behalf of Respondent No.2, on the other hand, submitted that the said notice was, in fact, served through two modes of postal service; firstly by issuing notice Under Certificate of Posting (UCP) and secondly by sending notice by Registered Post Acknowledgment Due (RPAD). He submitted that the notice was addressed at the address of the Petitioner and there was only a spelling mistake in the name and instead of “M”, the letter “J” was typed by his clerk. He submitted that, therefore, no prejudice is caused to the Petitioner since he had appeared before the Court. He submitted that so far as submission regarding alleged forging of the cheque was concerned, it was a question of evidence and, at this stage, the Magistrate could not have

decided this issue.

9. In my view, the submissions made by Mr. Parikh, the learned Counsel appearing on behalf of the Petitioner, cannot be accepted at this stage. Both the issues which are raised by the learned Counsel, in my view, will have to be decided at the stage of trial and since the presumption is raised under section 139 of the Negotiable Instruments Act and further since the said presumption is rebutable presumption, it is always open to the Petitioner to rebut the said presumption. Further, the same is a case in respect of service of notice. Therefore, at this stage, it would not be possible to interfere with the order of issuance of process.

10. Apart from that, it has been brought to my notice that the affidavit evidence has already been filed by the complainant and the trial has already begun and that is one another reason why, in my view, it would not be appropriate to consider these issues at this stage.

11. Trial Court is directed to decide the case as expeditiously as possible and, in any case, within a period of six months. Trial Court shall grant exemption to the Petitioner from appearing in Trial Court, unless it is absolutely essential at the stage of recording of the statement of the Petitioner under section 313 of the Cr.P.C. With these directions, Writ Petition is dismissed. Rule is discharged.

(V.M. KANADE, J.)